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THE IMMIGRATION ACT 2016:
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The Immigration Act 2016 completed its passage through parliament and became law on 12 May 2016. Only a few of the provisions in the Immigration Act 2016 entered into force on that date. Most of the provisions in the Act require a 'commencement order' to be made before they come into force. Only one commencement order has so far been made setting out those provisions that will come into force on 31 May 2016 and 12 July 2016. The Government will issue further commencement orders at later dates.

The Government has stated that the purpose of the Immigration Act 2016 was to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom. It therefore not only makes changes to immigration law and practice but also to areas such as housing, social welfare and employment in order to create a 'hostile environment'. This note gives a brief overview of the sections of the Act that make changes to immigration bail and detention.

Immigration detention: vulnerable persons

Section 59 of the Immigration Act 2016 places a duty on the Secretary of State to issue guidance on the detention of vulnerable persons. The guidance should cover matters to be taken into account when determining whether a person would be particularly vulnerable to harm in detention and, if so, whether they should be detained or remain in detention. The inclusion of this duty in the Immigration Act 2016 is the Government's response to the Review into the Welfare in Detention of Vulnerable Persons carried out by Stephen Shaw and will be in force from 12 July 2016.

Stephen Shaw recommended that the use of detention should be reduced as the fact of detention in itself contributed to vulnerability and undermined people's welfare generally. He made recommendations to limit the impact of detention on particularly vulnerable groups in the meantime, including:

- An absolute ban on the detention of pregnant women;
- An upper age limit for the detention of the elderly;
- A presumption against detention, in addition to those groups listed in current Home Office guidance, for:
    - victims of rape and other sexual or gender-based violence including FGM;
    - people suffering from serious mental illness;
    - people with Post Traumatic Stress Disorder;
    - people with learning difficulties;
    - transsexual individuals;
    - others identified as being sufficiently vulnerable that continued detention would harm their welfare, recognising the dynamic nature of vulnerability.

The Home Office has published its draft guidance under the duty *'Adults at risk in immigration detention'* inviting comments on the draft but undertaking no formal consultation.

The document lists the categories of people considered to be at particular risk of harm in detention which reflects the groups identified by Stephen Shaw above. It outlines three levels of evidence that will be considered and weighed in identifying those at risk of harm. These include a person's own testimony at the lowest level (level one); professional evidence that a person is from a vulnerable category, including a rule 35 report indicating torture, at level two; and professional evidence that a person is from a vulnerable category and detention will cause harm as the highest level of evidence (level three). Pregnant women will automatically be classified at level three. These factors will then be balanced against against immigration factors such as whether removal is likely within a reasonable period of time, the person's record of 'compliance' and any public protection issues. Without further guidance on how the factors are to be weighed, the policy may be less protective in its approach than current Home Office guidance which permits the detention of vulnerable persons only in exceptional circumstances. The guidance does not address the protection of victims of trafficking and modern slavery who will be considered in separate guidance.

The Government has also stated that it has commissioned Stephen Shaw to undertake a follow-up review towards the end of 2017 so that the impact its new measures may be evaluated.

Limitation on the detention of pregnant women

A limitation is placed on the detention of pregnant women in a separate provision (section 60 of the Immigration Act 2016) which will also come into force on 12 July 2016.

Pregnant women may only be detained in exceptional circumstances and for no longer than 72 hours (or seven days if the Minister personally authorises this in the individual case) from when detention begins or from when the Home Office is satisfied that the woman is pregnant, whichever is the later. The provisions do not, however, prevent pregnant women from being detained more than once.

The provision is not the absolute ban on pregnant women recommended by Stephen Shaw but a significant improvement on the current situation which allows pregnant women to be held indefinitely in unsatisfactory conditions in immigration detention. There remain concerns about the absence of provisions providing pregnant women with notice of removal which gives rise to the risk of their being whisked into detention without notice, disrupting their medical care and causing high levels of distress to the woman and her unborn child. In response to further concerns about the difficult and lengthy journeys experienced by pregnant women when taken to immigration removal centres, the Minister a review of the process of transporting pregnant women.

Immigration bail

New provisions on immigration bail are introduced by section 61 and schedule 10 to the Immigration Act 2016 which are not yet in force (with one exception identified below).

Bail and temporary admission will be replaced by a single new concept of immigration bail. All those whose immigration status is being determined will be granted immigration bail if they are not detained. Immigration bail may be granted by the Secretary of State (or rather

an immigration officer acting on her behalf) or if a person is detained, by the First-tier Tribunal.

Conditions of immigration bail

Immigration bail must be granted subject to one or more of the following conditions:

- appearance before the Secretary of State or First-tier Tribunal at a specified date and place;
- restriction as to work, occupation or studies;
- restriction as to residence;
- reporting requirements (to the Secretary of State or another person);
- electronic monitoring ('tagging'); or
- any other conditions that the person granting bail thinks are appropriate.

The person granting immigration bail may vary these conditions and if this is the First-tier Tribunal, the Tribunal may direct that this is dealt with by the Secretary of State instead. Breach of bail conditions will continue to be a criminal offence.

A recognisance (sum of money) or surety may also be required as a condition of granting immigration bail. As is the case currently, this may be imposed to ensure that an individual complies with their other conditions of bail and may have be paid if they fail to do so provided they have had the opportunity to make representations about this.

Whilst conditions of residence, reporting and restrictions on work are similar to current temporary admission requirements, the restriction on studies is new. During debates on the Immigration Bill, the Minister in the House of Lords stated that this was a power that would be used only in the most exceptional circumstances pertaining to terrorism.

The Act makes clear that a person may be on immigration bail and subject to the conditions of immigration bail even if they cannot practically be detained, for example, because there is no prospect of removal. These are the only bail provisions currently in force (subsections 61(3) to (5)) and they have retrospective effect, meaning that this is treated as always being the case.

Electronic monitoring conditions

The Government made a commitment in its election manifesto to tag all foreign national offenders who were not detained. It originally sought to achieve this in the Bill through the inclusion of a power to overrule a court or tribunal that decided not to impose an electronic monitoring condition on an individual. This naturally raised concerns about the compatibility of the provision with the rule of law.

The Government instead included a provision stating that a person who is detained or liable to be detained pending deportation must be subject to an electronic monitoring condition as a condition of granting immigration bail unless the Secretary of State considers it either impractical or contrary to the person's rights under the European Convention on Human Rights to do so. The measure is likely to be brought into force with transitional provisions enabling the Home Office to bring it in gradually for different groups of people.

There are no provisions to cover the potential situation where the Tribunal considers that imposing an electronic monitoring condition would breach the person's rights under the European Convention on Human Rights and, as a public authority, the Tribunal has a duty not to act in a way that is incompatible with a Convention rights. The Tribunal is also prevented from varying an electronic monitoring condition imposed by the Secretary of State.

Support and accommodation to meet conditions of bail

The Immigration Act 2016 makes significant changes to the system of Home Office support and accommodation under section 66 and schedule 11 of the Act, though these provisions are only likely to come into force next year.

Section 4 of the Immigration and Asylum Act 1999 will be repealed though there will be some transitional protection for those currently supported under section 4 for a period of time. People making further submissions on asylum or protection grounds will be supported under section 95 of the Immigration and Asylum Act 1999 instead and continue to be supported in this way if their submissions are accepted as a fresh claim. Others at the end of the asylum process may access support under new section 95A of the Immigration and Asylum Act 1999 if they face a genuine obstacle to removal and, under regulations likely to be made, if they apply within a set period of time. There are no specific provisions for the support and accommodation of adults without children who have never made an asylum claim (such as some stateless people or others who cannot leave the UK) or who have made further submissions on non-protection grounds.

There is, however, a general power to enable the Secretary of State to provide support and accommodation to a person on immigration bail to enable them to meet conditions of bail but only in exceptional circumstances. This provision could be used to ensure that migrants who do not qualify for other forms of support are able to access accommodation to secure their right to liberty and prevent destitution but it is unclear how this power will be applied.

Duty to arrange consideration of bail

The Immigration Act 2016 introduces a provision (paragraph 11 of Schedule 10) which places a duty on the Secretary of State to arrange a bail hearing before the Tribunal for a detainee in certain cases.

The Home Office must arrange a bail hearing before the Tribunal for a detainee four months after the date of their detention or four months after the date of their last bail hearing (whether it was the previous automatic bail hearing or a bail hearing that the detainee applied for themselves) whichever is the later. These automatic bail hearings would continue every four months in the same way.

Individuals who are detained pending deportation (because they have committed a criminal offence leading to their being deported rather than removed under normal administrative processes) may not benefit from this safeguard. This gives cause for concern since it is this group of immigration detainees who experience the longest forms of indefinite detention without judicial oversight.